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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

71-1016

FEDERAL POWER COMMISSION,
Petitioner,
v.
LOUISIANA POWER & LIGHT COMPANY,
(The Injunction Proceeding)
Respondent.

FEDERAL POWER COMMISSION,
Petitioner,
v.
LOUISIANA POWER & LIGHT COMPANY, *et al.*,
(The Curtailment Proceeding)
Respondents.

71-1040

UNITED GAS PIPE LINE COMPANY AND
PENNZOIL UNITED, INC.,
Petitioner,
v.
LOUISIANA POWER & LIGHT COMPANY,
Respondent.

UNITED GAS PIPE LINE COMPANY,
Petitioners,
v.
LOUISIANA POWER & LIGHT COMPANY, *et al.*,
(FPC Opinion 606)
Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in the injunction proceeding is not yet reported. The opinion of the District Court in that proceeding is reported at 332 F. Supp. 692. The opinions and

orders of the FPC in the curtailment proceeding (Opinion Nos. 606 and 606-A) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 14, 1972. The order of the FPC denying rehearing was issued on December 3, 1971. The jurisdiction of this Court is invoked under 28 U.S. 1254 (1) and 15 U.S.C. Sec. 717r(b).

QUESTIONS PRESENTED

1. Whether this Court may and should review, before judgment by a court of appeals, a declaratory opinion of the FPC that it has plenary authority under the Natural Gas Act to allocate the interstate gas supplies of an interstate pipeline on the basis of ultimate end-use where the agency is acting in an administrative or legislative, rather than quasi-judicial capacity, and the agency seeks an advisory opinion on an abstract question of law.

2. Whether this Court should review the judgment of a Court of Appeals, not yet final, in a private suit by an industrial consumer against its pipeline company supplier for breach of two direct sales contracts where:

   (a) One contract is fulfilled by furnishing gas from an interstate pipeline certificated by the FPC, and

   (b) The other contract is fulfilled by furnishing gas produced, transported, delivered and consumed wholly within Louisiana from a separate intrastate pipeline regulated by the Louisiana Public Service Commission, which continues to exercise its preexisting jurisdiction, although an application for a certificate has been filed with the FPC by the pipeline company.

STATUTES INVOLVED

Sections 1, 4, 5, 7 and 16 of the Natural Gas Act, 15 U.S.C. 717, 717c, 717d, 717f, 717o and 717r(b), are set forth in Petitioners' appendices.

STATEMENT OF THE CASE

State of Louisiana, Louisiana Municipal Association and the Parish of Cameron (hereinafter "The State") oppose the granting of the writs of certiorari sought by petitioners.

The injunction and curtailment cases raise the issue of whether the FPC has statutory authority to control the ultimate end-use of gas, purchased by industrial consumers or delivered by distributors not subject to federal regulation, by allocating specific gas volumes to the resale and direct sale customers of an interstate pipeline in a manner inconsistent with the pipeline's certificate and contract obligations. The State denies that the Commission may make or approve such allocations even with respect to resale customers.

Assuming that the FPC has such statutory authority, the curtailment case presents the further issue of whether a pipeline's implementation of such an agency approved allocation ousts the courts of their constitutional and statutory jurisdiction to adjudicate cases or controversies between private parties and affords the pipeline an absolute defense to any federal or state suits for injunctive relief, specific performance or damages.

The State, an intervenor and five parties to the curtailment proceeding, have filed timely petitions for review in the Court of Appeals.[1] The State has raised certain issues not raised by any of the other parties in that proceeding. These are, among others:

1. Whether the FPC's election to deal with a national gas shortage on a pipeline-to-pipeline

[1] On February 16, 1972, the Court of Appeals granted the State's motion to intervene and consolidated all six review proceedings.

basis which excludes all consideration of equities between gas producing and gas consuming States, rather than upon a nationwide basis reflecting such consideration, is an abuse of its administrative discretion.

2. Whether the FPC's refusal to conduct a nationwide allocation proceeding for the purpose of allocating all available interstate gas supplies between States, leaving to each State the responsibility for controlling the end-use of gas by its citizens, is unlawful, unduly prejudicial and creates an unreasonable difference in service between localities.

The issues in the injunction proceeding cannot be resolved without determining whether United's deliveries to LPL's Nine-Mile Point Generating Station are intrastate in nature and thus beyond the statutory jurisdiction of the FPC, under the Natural Gas Act.

Curtailment Proceeding

This proceeding was commenced by United's filing with the FPC, on October 26, 1970, a petition for a declaratory order adjudicating whether the curtailment program it made effective with Commission approval, on November 1, 1970, was consistent with the provisions of Section 12 of the General Terms and Conditions of its FPC Gas Tariff and in accordance with its direct sales contracts.[2] On December 10, 1970, the Commission scheduled hearings to begin eleven days later, on December 21, 1970. Expedited hearings were concluded on July 27, 1971 and all briefs were submitted on September 20, 1971. On August 23, 1971, the FPC granted its Staff's motion to omit an examiner's intermediate decision for the purpose of preventing delay in resolving the important questions presented.

[2]United twice revised its tariffs, on March 10, 1971 and May 17, 1971 to conform then to its interpretation of the original Section 12.

On October 5, 1971, despite the fact that the case was ripe for a decision on the merits, the FPC in Opinion 606 neither prescribed nor approved any specific curtailment plan. Nor did it adjudicate in a declaratory order pursuant to United's original and supplemental[3] petitions the important legal issues thereby raised. Instead, without any explanation, the FPC in Opinion 606-A abandoned its announced plan to render an expedited decision and on December 3, 1971 remanded all issues to its Examiner for initial decision.[4]

Opinion No. 606 contains no ordering clauses relating to the fundamental issue of statutory authority sought to be reviewed in the curtailment proceeding. However, the FPC, made a formal declaratory finding (Sol. Gen. App. E, 74a) that:

> (2) Plenary jurisdiction resides within this Commission to accept, modify, and/or approve the curtailment plans proposed by United Gas Pipe Line Company or any other jurisdictional pipeline company relating to gas transported both to resale and direct sale customers.

The FPC also made an informal declaratory finding, in the body of its opinion, that implementation of any curtailment plan by a pipeline pursuant to its procedures ". . . would be an absolute defense for United against all claims for specific performance, damages, or other requests for relief under these [direct sale] contracts affected by curtailments that may be initiated in the courts." This statement was made in rejecting as unnecessary substitute fuel clauses proposed by United although the original clauses called for monetary compensation rather than specific performance. Commissioner Carver characterized this informal finding as ". . . a self-serving dictum not binding on anyone, least of all the courts who must ultimately rule upon the effect of

[3]Filed on February 22, 1971.

[4]It did decide three narrow and separable issues of minor importance.

our orders"; he noted that these contracts neither required nor received FPC approval and expressed the view that this FPC action did not reflect a proper sense of comity in judicial-administrative relations (App. E, 84a).

Injunction Proceeding

On March 31, 1971, Louisiana Power & Light Company (LPL) brought suit in the District Court to enjoin the enforcement of United's curtailment plan which was alleged to conflict with service priority rights expressly granted LPL in its direct sale contract with United. On April 28, 1971, the FPC intervened and filed a motion to dismiss for lack of subject matter jurisdiction. On April 29, 1971, United also filed such a motion.

On April 29, 1971, the District Judge granted these motions and dismissed LPL's complaint. On May 5, 1971, a Fifth Circuit panel of Judges Wisdom, Coleman and Simpson heard counsel for the FPC, United and LPL, and remanded the case to the District Court with directions to ". . . hold a full hearing at which the parties may present evidence bearing upon the jurisdiction issue." (Sol. Gen. App. D, 46a.) The order entered directed an expedited hearing on the issue of ". . . the jurisdiction of the court and on other appropriate preliminary questions." (Id., App. D, 46a.)

The District Judge conducted an evidentiary hearing on the jurisdictional issues on May 27, 1971, and dismissed the complaint. He concluded that the fact that United's curtailment plan reduced its gas deliveries below contract entitlement volumes did not demonstrate irreparable injury; that the curtailment proceedings were within the jurisdiction of the FPC and that its expertise was necessary to dispose of the issues (Id., App. C, 38a-42a).

The Court of Appeals heard argument November 18, 1971 and issued its opinion January 14, 1972, reversing the District Court and remanding for full hearing on the merits

(Id., App. A, 27a and App. B, 29a). It held that the lower court erred in finding a failure of proof on the irreparable injury issue because LPL did not have that burden at that state of the proceeding and because the record did not demonstrate such injury was not likely to occur (Id., App. A, 12a). The Fifth Circuit decided, as a matter of statutory construction, that the FPC had no jurisdiction over direct sales for gas allocation purposes and, upon the basis of the undisputed facts established at the evidentiary hearing before the District Court,[5] that the Green System serving LPL's Nine-Mile Point Generating Station was intrastate in nature and thus beyond the certificate jurisdiction of the FPC.

The Court of Appeals rejected the claims of United and the FPC that the pendency of both the certificate and curtailment proceedings before that agency barred court relief. It applied the same three-part test (See 3 K. Davis, Administrative Law Treatise, Secs. 20.01 through 20.03) as the District Court. However, it corrected the erroneous conclusions of the lower court as to potential injury and the weight to be given pending administrative proceedings where proposed agency action clearly exceeded the agency's statutory authority. The Court of Appeals also rejected United's claim that the issuance of Opinion No. 606 mooted the injunction proceeding since that agency action was itself subject to review. The Court of Appeals judicially noticed the FPC's determination in Opinion No. 606 that it needed continuing jurisdiction over gas sold under certificated direct sale contracts in order to accord full protection to the public since state commissions could not formulate a uniformly fair plan for the allocation of gas during periods of shortage (Id. App. A, 7a). But, while accepting the validity of this premise for the purposes of its decision, the court expressly refrained from any ruling upon the merits of Opinion No. 606 (Id., App. A, 27a).

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[5] Id., App. A, 22a.

REASONS WHY WRITS SHOULD NOT BE GRANTED

Curtailment Proceeding

1. Petitioners have represented to this Court that unless the FPC has statutory authority to allocate gas volumes to direct sales customers, without regard to the applicable curtailment provisions in the contracts between United and its power plant and industrial customers, essential gas deliveries to domestic users, schools, hospitals and other vital public institutions might be jeopardized. The FPC utterly failed in its Opinion No. 606 to make any findings of fact, supported by record evidence, that the dangers it perceived and the uncontrolled disruption in the determination of service priorities it feared would actually occur. The State's petition for rehearing attacked this deficiency but the FPC did not cure it in Opinion No. 606-A. Petitioners now belatedly attempt to remedy this defect by invoking, on a selective and wholly unfair basis, certain facts in the raw evidentiary record. This Court should not be called upon to make the factual determinations which the agency deliberately omitted.

2. Petitioners have neglected to advise this Court of vital facts which demonstrate the alleged national emergency to be an imaginary spectre. United's direct sales contracts all contain an Impariment of Deliveries Provision[6]

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[6] "IMPAIRMENT OF DELIVERIES

Buyer specifically recognizes the fact that Seller delivers gas to gas utilities for resale to domestic consumers and to public utility power plants for generation of electricity which is sold to domestic consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers and public utility power plants using gas for generation of electricity which is sold to domestic consumers shall first be supplied by Seller, and the remaining available gas shall be prorated by Seller among its other consumers." (In the industrial contracts there appear the words "including buyer" at the end of the paragraph.) (Exhibit 59, Curtailment Proceeding.)

which, without regard to how it may be construed, clearly does not entitle each of such customers to full contract volume deliveries on each and every day of the year whether or not there is enough gas to meet both their needs and those of domestic and institutional consumers. Nor have they mentioned the substantial differential which exists between the *average daily* deliveries and the *maximum peak day* deliveries respectively needed for ultimate domestic and institutional use. *United's curtailment plan subordinates its direct sale customers to such peak day needs of domestic, and commercial, end-users on each and every day of the year.*[7] The FPC has not made any finding that this is consistent with the terms of their contracts, and the State views it as both illegal and extremely inequitable.

3. Petitioners also seek to create the impression that all direct sales contracts concerning gas for use in electric generating plants and in industrial plants are *firm*, rather than *interruptible*. By definition, the latter class of customers are subordinate in service priorities to gas purchased for domestic and commercial use which is always on a firm basis. In fact, a maximum of 37% of all direct-sales gas used for such purposes in the United States is sold on a firm basis by interstate pipelines[8] (App. A, infra).

[7] Section 12.1, Proration of Impaired Deliveries, of United's FPC Gas Tariff establishes a four priority category scheme for curtailment purposes, based respectively, on end use for domestic, process gas, electric generation to serve domestic users and industrial purposes. United's curtailment plan which is not part of its filed tariffs establishes base requirements for each pipeline, resale and direct sale customer, which reflect historic usage in a test year. These base requirements are subject to curtailment to the degree that the gas purchased by each customer is utilized for industrial or other lower priority purposes. The determination of such inferior uses is made on the arbitrary and unrealistic method of looking only to peak day end use.

[8] The statewide data from which this figure is derived includes interstate, intrastate and unregulated industrial pipelines. The percentage of firm gas sold by the latter two classes is generally substantially greater than the comparable percentage for interstate pipelines. While data was solicited from all intrastate and industrial pipelines some may not have responded.

United is an atypical pipeline, not representative of the national picture since it has a far higher percentage of industrial sales than any other major pipeline and has historically sold only firm gas. The FPC could inform this Court, by inspection and analysis of the direct sale contracts in its official files[9] of the actual percentage of firm gas[9a] and of the varying classes of self-enforcing curtailment provisions in all such contracts of interstate pipelines. Absent such data, its claim of a dire national emergency lacks credibility.

4. Petitioners would have this Court believe that unless the FPC has jurisdiction to curtail direct sales customers and to nullify both their certificate and contract rights state and federal courts will, by granting equitable relief in the form of an injunction or specific performance, compel interstate pipelines to deliver on every day of the year full contract volumes to such customers and thereby prevent deliveries of essential requirements to domestic and institutional consumers. It is axiomatic that equitable re-

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[9] Such contracts are filed pursuant to the requirements of Section 155.1 of the Regulations under the Natural Gas Act. *Of the seven major interstate pipelines now in curtailment, United alone has firm direct mainline sales exceeding 1% of total annual sales.*

[9a]

Pipeline Company	*Number of Firm Direct Mainline Customers*	*Firm Direct Mainline Sales as Percentage of Total Annual Sales*
Arkansas Louisiana Gas Co.	0	0
Natural Gas Pipeline Company	2	0.898%
Panhandle Eastern Pipe Line Co.	0	0
Texas Eastern Transmission Corp.	0	0
Transcontinental Gas Pipe Line Corp.	1	0.290%
Trunkline Gas Company	1	0.005%

Source: FPC Form No. 2 for year 1970, Gas Operating Revenues, Customers and Sales.

lief is granted only by an exercise of sound judicial discretion which cannot be presumed to result in action clearly adverse to the public interest. Courts of equity would strike a proper balance between the contract rights of direct industrial customers and the consequences to the public welfare of granting such requests (*Eccles v. Peoples Bank*, 333 U. S. 426, 432).

5. United contends that the issue of the FPC's power to curtail direct industrial customers is of critical importance to the regulated interstate pipelines and to their resale and direct sale customers. This interest concerns only the possibility that pipelines will be exposed to suits for money damages which is not of such imperative public importance as to satisfy the standards of Rule 20, of this Court, as to the showing which must be made to justify bypassing the Court of Appeals. Many other questions of equal concern to all segments of the natural gas industry, such as the power of the FPC to regulate independent producers,[10] and the transition from individual to area rates for such natural gas companies,[11] have been dealt with by normal appellate processes.

6. The FPC errs in representing that this Court's power to issue a writ of certiorari before judgment in cases coming directly to the Courts of Appeals from administrative agencies has never been definitively determined (Sol. Gen. Pet., 21). Congress lacks constitutional power to invest this Court with jurisdiction to act before judgment where the original determination is that of an administrative agency acting in an administrative or legislative capacity (*Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 275; *Federal Radio Commission v. General Electric Co.*, 281 U.S. 464, 467; *Keller v. Potomac Electric Power Co.*, 261 U.S. 428, 442-444; Cf. *Wheeler Lumber Bridge & Supply Co. v. United States*, 281

[10] *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 675.

[11] *Permian Basin Area Rate Proceedings*, 390 U.S. 747.

U.S. 572, 577; *Baltimore & Ohio Railway Co. v. I.C.C.*, 215 U.S. 216, 221-223; *United States v. Rice*, 327 U.S. 745, 747).[12] In such situations, action by this Court without an intermediate judicial review would constitute the exercise of original rather than appellate jurisdiction in circumstances outside the scope of Article III, Section 2 of the Constitution. The FPC neither determined the lawfulness of the specific gas allocation plan proposed by United nor prescribed its own plan. Such substantive determinations were deferred pending the outcome of the remanded proceedings. All the agency did was render a legal interpretation of the scope of its powers under the Natural Gas Act to approve or modify curtailment plans initiated by individual pipelines. This is essentially *administrative* action. At most, it could be deemed the making of a rule for the future which is *legislative* in character (*Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 225-226).[13]

7. The declaratory opinion of the FPC in the curtailment proceedings does not finally dispose, in whole or in part of any case or controversy, does not definitively determine the status or rights of the parties to FPC Docket No. 71-29, et al., and does not order or prohibit any action relating to

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[12]These cases which deal with statutory certification of questions by federal courts are distinguishable, but nevertheless consistent with the squarely applicable precedents.

[13]The FPC suggests that judicial review of Opinion Nos. 606 and 606-A would be appellate in nature since its determination was based on an evidentiary record (Sol. Gen. Pet., 22). But, the FPC made a pure legal determination on the question sought to be reviewed before this Court which was not based on any findings of fact, as even a cursory reading of its opinions will disclose. Moreover, the substance of an agency determination, rather than its form, is controlling. An agency which promulgates a substantive rule in an adjudicatory proceeding but does not apply it to the parties thereto is exercising "its quasi-legislative power" (*NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765-766, *Accord:* dissent of Justice Douglas at 777 and dissent of Justice Harlan at 780).

the Commission's claimed statutory power to curtail direct sale customers.[14]

Thus, Petitioners are seeking an advisory opinion from this Court on an abstract question of law which is beyond the scope of its judicial power under Article III of the Constitution (*Liberty Warehouse Co. v. Grannis*, 273 U.S. 70, 74; *New Jersey v. Sargent*, 269 U.S. 328, 330; *Fairchild v. Hughes*, 258 U.S. 126, 129; *Massachusetts v. Mellon*, 262 U.S. 447, 488; *Texas v. Interstate Commerce Commission*, 258 U.S. 158, 162; Cf. *National Labor Relations Board v. White Swan Co.*, 313 U.S. 23, 26-27.

8. United contends (Pet. 10) that the Louisiana Public Service Commission is constitutionally prohibited from regulating curtailment practices of intrastate gas pipelines. Its interpretation of Article VI, Section 4, of the Louisiana Constitution is incorrect since the same constitutional provision also provides that the ". . . power, authority, and duties of the Commission shall affect and include all matters and things connected with, concerning, and growing out of the service to be given or rendered . . ." by such companies. This is an unusually broad delegation of power not found in the conventional state or federal public utility statute. Further, in a Special Order issued September 28, 1971 and in a General Order issued September 30, 1971, the Commission declared that it "has been vested with the authority and responsibility to regulate and control utilities with respect . . . to the *services* rendered by public utilities" and exercised such powers with respect to both United and other intrastate pipelines by instituting a comprehensive investigation. The FPC has conceded that its "jurisdiction was not

[14] United's curtailment plan had been made effective as to both resale and direct sale customers by unrelated orders permitting it to become effective issued on May 18, 1971 and May 28, 1971 which are not encompassed by the pending petitions for review in the Court of Appeals. United's erroneous claim (Pet. 8) of direct conflict between the Fifth Circuit decision and that of a district court in another Circuit is based on review of these orders for interim enforcement of the curtailment plan.

intended to vary from state to state depending upon the degree of state regulation." (*The Secretary of the Army, Atlantic Seaboard Corporation*, Order Denying Rehearing, Dkt. No. CP66-179, issued October 22, 1971).

Petitioners claim that this Court should construe the Act broadly in favor of federal regulation of end use of natural gas because state commissions cannot adequately deal with this problem. But, as the FPC itself recognized in Opinion No. 606-A: "*Our jurisdiction over the disposition of natural gas ends when it reaches the hands of a nonjurisdictional person such as a distributor purchasing for resale.* This language would in effect attempt to extend our jurisdiction over the disposition of gas by a local distributor, a matter within the province of the local regulatory body." (Sol. Gen. App. F, 71a.)

Injunction Proceeding

9. Petitioners seek review of a judgment of the Court of Appeals which has remanded the case to the District Court for findings on the issue of irreparable injury. Thus, no final order or decree has been entered and the case is not yet ripe for review by this Court (*Germania v. United States*, 389 U.S. 328; *Hamilton Shoe Co. v. Wolf Brothers*, 240 U.S. 251, 257-258).

10. Petitioners seek review of the curtailment issue in the context of the injunction proceeding for the purpose of obtaining a broad advisory opinion which will have far-reaching consequences beyond the scope of this narrow private litigation. Only one of United's forty-six industrial and power plant direct sale customers is a party to this suit. Further, the curtailment proceeding presents a comprehensive and interrelated set of issues which must be considered together to fully and fairly resolve the matters presented for decision on statutory review of Opinion No. 606 (see, supra, pp. 14). By way of contrast, the injunction proceeding presents for decision only an isolated and fragmented

portion of the whole complex of problems posed by the FPC's effort to obtain an advisory opinion that it has plenary jurisdiction over pipeline curtailment plans. This court has applied a maximum of caution in granting requests for advisory rulings whose implications cannot be foreseen (*Public Service Commission of Utah v. Wycoff Company, Inc.*, 344 U.S. 237, 242-244). The State respectfully submits that such caution is essential here because some of the drastic and far-reaching consequences of the legal blank check sought by this agency are already evident. Pipelines will be permitted to curtail customers before they even experience a gas supply shortage if they elect to fail to provide additional transmission capacity needed to serve their resale and direct customers because of the additional risk involved in making such investments during a period of potential future gas shortages.[15] The FPC has also indicated that both resale and direct sale certificates must be continuously reevaluated to make all direct and resale pipeline rates and charges "fully compensatory" and thus provide financial incentive to encourage exploration for and development of new gas reserves (Sol. Gen., App. A, 7a, App. E, 64a). The State submits that gas allocation proceedings are not the proper vehicle for dealing with this problem.

11. Petitioners seek review by this Court of the question of whether the Fifth Circuit abused its judicial discretion in determining the merits of the issue of whether United's separate intrastate pipeline facilities used to serve LPL's Nine-Mile Point Generating Station are intrastate in nature and beyond the statutory jurisdiction of the FPC. Significantly, they do not make any attack upon the legal test applied by the Court of Appeals or upon the soundness of its application of the controlling legal principles to the

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[15] Order Suspending Proposed Tariff Sheets, etc., p. 4 issued August 5, 1971, 1971 in *El Paso Natural Gas Company*, Docket RP72-6. Sec. 11.3 Curtailment Procedures, El Paso Natural Gas Co., FPC Gas Tariff, issued July 2, 1971.

undisputed facts of record. Instead, they invoke the doctrine that a federal court should not enjoin the conduct of administrative proceedings merely because one of the private parties challenges the agency's jurisdiction.[16] No such interference was attempted in the injunction proceeding which is a private law suit and the FPC was neither a defendant nor obliged to intervene.

United also cites *Marine Engineers v. Interlake Co.*, 370 U.S. 173, which is completely distinguishable since it concerned the administration of the federal labor statutes which this Court has held involve a congressional delegation to that agency of power to determine the metes and bounds of its own domain. No such broad preemption rule can be applied in determining whether the Louisiana Public Service Commission which has always regulated United's separate intrastate pipeline systems has lost jurisdiction to the FPC because of the unilateral action of that company in filing an application for a federal certificate. These considerations make this a particularly appropriate case for the application of the rule that exhaustion of administrative remedies is unnecessary where the agency is clearly acting in excess of its statutory authority. *Leedom v. Kyne*, 358 U.S. 184, *Skinner & Eddy Corp. v. United States*, 249 U.S. 557, 562; *Deering Milliken, Inc. v. Johnson*, 295 F.2d 856 (C.A. 4).

12. Petitioners position here is inconsistent with the views they earlier urged upon both the District Court and the Court of Appeals where they denied the jurisdiction of the court to decide either the certificate or the curtailment issue because agency proceedings were pending. Petitioners claim (Sol. Gen. Pet. 20; United Pet. 14, ftn. 26) that the discretionary prior exhaustion of remedies issue is now moot as to the curtailment issue because the FPC issued its Opinion 606 and 606-A prior to the Court of Appeals decision. This argument proves too much, since the FPC, on February

[16] *Myers v. Bethelem Shipbuilding Corp.*, 303 U.S. 41 and *Federal Power Commission v. Arkansas Power & Light Co.*, 303 U.S. 802, rev'g mem. 156 F.2d 821 (C.A. D.C.)

9, 1972, issued its Opinion No. 610 in the certificate proceeding thereby under their view also mooting the certificate issue which they urge this Court to review. Aware of this dilemma, United suggests that the certificate issue will not be ripe for review by any court until the FPC exhausts its administrative rehearing procedures. This is wholly untenable since, as the Court of Appeals noted (Sol. Gen. App. 27a; ftn. 18) it is the pendency rather than the conclusion of agency proceedings which may, under certain circumstances, require a court to refrain from exercising its judicial powers until the agency has finally acted. Petitioners' equally futile and unsound effort to distinguish the curtailment and certificate issues on the ground that the Fifth Circuit has squarely rejected the legal rationale of the FPC's curtailment decision runs afoul of the hard fact that that court also squarely rejected the legal rationale underlying the FPC's recent certificate decision.

CONCLUSION

For the reasons stated,[17] the State strongly opposes the granting of the petitions for writs of certiorari, and urges that they be promptly denied.

Respectfully submitted,

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February, 1972.

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[17]We note further that the decision below is clearly consistent with the principles underlying the controlling precedence in this Court, *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, and *Federal Power Commission v. Transcontinental Gas Corp.*, 365 U.S. 1.

APPENDIX A

GAS REQUIREMENTS
FIRM INDUSTRIAL AND FIRM GENERATION
PERCENT FIRM OF TOTAL
(MILLION CUBIC FEET)

	Firm		Total Firm Industrial and Generation	Total All Uses	Percent Firm Industrial and Generation Of Total
	Industrial	Generation			
Louisiana	1,181,538	315,274	1,496,812	1,790,250	84
Texas	1,933,846	835,163	2,769,009	4,008,246	69
Arkansas	189,877	94,333	284,210	418,346	68
Nevada	12,656	21,287	33,943	54,399	62
Mississippi	129,647	83,595	213,242	371,361	57
Florida	55,681	143,847	199,528	362,028	55
Oklahoma	56,703	224,331	281,034	540,566	52
W. Virginia	80,750	45	80,795	215,504	37
Indiana	191,067	3,299	194,366	546,422	36
Ohio	371,781	12,960	384,741	1,112,768	35
Pennsylvania	292,585	683	293,268	841,296	35
Alabama	108,861	133	108,994	317,765	34
Delaware	8,162	88	8,250	27,320	30
Illinois	283,860	72,341	356,201	1,216,941	29
Idaho	11,683	-	11,683	45,320	26
Tennessee	72,972	-	72,972	300,787	24
Michigan	170,611	27,854	198,465	877,807	23
Maryland	23,362	11,513	34,875	165,111	21
Maine	394	-	394	1,906	21
Virginia	28,346	-	28,346	144,013	20
Connecticut	12,682	-	12,682	64,020	20
Iowa	62,359	424	62,783	378,610	17
N. Carolina	26,970	3	26,973	157,610	17
Wyoming	13,077	-	13,077	75,417	17
Kentucky	39,854	335	40,189	254,315	16
Rhode Island	3,286	-	3,286	24,109	14
Washington	22,141	-	22,141	159,100	14
Oregon	13,296	-	13,296	93,715	14
Wisconsin	38,970	3,049	42,019	328,652	13
Arizona	23,654	4,876	28,530	215,375	13
Minnesota	38,748	3,601	42,349	332,197	13
Nebraska	28,429	-	28,429	215,369	13
Georgia	44,568	-	44,568	368,446	12
New York	87,639	335	87,974	762,010	12
S. Carolina	18,916	-	18,916	161,523	12
Kansas	56,934	7,319	64,253	602,834	11
New Jersey	39,669	178	39,847	357,652	11
Missouri	37,729	5,043	42,772	439,698	10
Colorado	17,186	5,180	22,366	254,814	9
Massachusetts	13,413	486	13,899	151,907	9
New Mexico	4,717	8,322	13,039	167,263	8
Montana	2,590	1,234	3,824	82,468	5
California	86,922	32,014	118,936	2,177,896	5
Utah	3,618	-	3,618	122,358	3
New Hampshire	185	-	185	5,430	3
Vermont	29	-	29	2,619	1
S. Dakota	160	-	160	31,435	1
N. Dakota	30	-	30	19,463	0
Dist. of Col.	-	-	-	27,852	-
United States**	5,942,153	1,919,145	7,861,298	21,392,314	37

Source: Future Gas Requirements of the United States.* Volume No. 4, October 1971, Appendix C—Calendar year 1970. Prepared by the Future Requirements Committee under the auspices of the Gas Indus-

GAS REQUIREMENTS

FIRM INDUSTRIAL AND FIRM GENERATION

PERCENT FIRM OF TOTAL
(MILLION CUBIC FEET)

	FIRM		TOTAL FIRM INDUSTRIAL AND GENERATION	TOTAL ALL USES	PERCENT FIRM INDUSTRIAL AND GENERATION OF TOTAL
	INDUSTRIAL	GENERATION			
LOUISIANA	1,181,538	315,274	1,496,812	1,790,250	84
TEXAS	1,933,846	835,163	2,769,009	4,008,246	69
ARKANSAS	189,877	94,333	284,210	418,346	68
NEVADA	12,656	21,287	33,943	54,399	62
MISSISSIPPI	129,647	83,595	213,242	371,361	57
FLORIDA	55,681	143,847	199,528	362,028	55
OKLAHOMA	56,703	224,331	281,034	540,566	52
W. VIRGINIA	80,750	45	80,795	215,504	37
INDIANA	191,067	3,299	194,366	546,422	36
OHIO	371,781	12,960	384,741	1,112,769	35
PENNSYLVANIA	292,585	683	293,268	841,296	35
ALABAMA	108,861	133	108,994	317,765	34
DELAWARE	8,162	88	8,250	27,320	30
ILLINOIS	283,860	72,341	356,201	1,216,941	29
IDAHO	11,683	-	11,683	45,320	26
TENNESSEE	72,972	-	72,972	300,787	24
MICHIGAN	170,611	27,854	198,465	877,807	23
MARYLAND	23,362	11,513	34,875	165,111	21
MAINE	394	-	394	1,906	21
VIRGINIA	28,346	-	28,346	144,013	20
CONNECTICUT	12,682	-	12,682	64,020	20
IOWA	62,359	424	62,783	378,610	17
N. CAROLINA	26,970	3	26,973	157,610	17
WYOMING	13,077	-	13,077	75,417	17
KENTUCKY	39,854	335	40,189	254,315	16
RHODE ISLAND	3,286	-	3,286	24,109	14
WASHINGTON	22,141	-	22,141	159,100	14
OREGON	13,296	-	13,296	93,715	14
WISCONSIN	38,970	3,049	42,019	328,652	13
ARIZONA	23,654	4,876	28,530	215,375	13
MINNESOTA	38,748	3,601	42,349	332,197	13
NEBRASKA	28,429	-	28,429	215,369	13
GEORGIA	44,568	-	44,568	368,446	12
NEW YORK	87,639	335	87,974	762,010	12
S. CAROLINA	18,916	-	18,916	161,523	12
KANSAS	56,934	7,319	64,253	602,834	11
NEW JERSEY	39,669	178	39,847	357,652	11
MISSOURI	37,729	5,043	42,772	439,698	10
COLORADO	17,186	5,180	22,366	254,814	9
MASSACHUSETTS	13,413	486	13,899	151,907	9
NEW MEXICO	4,717	8,322	13,039	167,263	8
MONTANA	2,590	1,234	3,824	82,468	5
CALIFORNIA	86,922	32,014	118,936	2,177,896	5
UTAH	3,618	-	3,618	122,358	3
NEW HAMPSHIRE	185	-	185	5,430	3
VERMONT	29	-	29	2,619	1
S. DAKOTA	160	-	160	31,435	1
N. DAKOTA	30	-	30	19,463	0
DIST. OF COL.	-	-	-	27,852	-
UNITED STATES**	5,942,153	1,919,145	7,861,298	21,392,314	37

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*Alaska and Hawaii omitted.